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No. 94-6790

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HARVEY F. GARLOTTE,
Petitioner,

v.

KIRK FORDICE,
Governor of Mississippi,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE PETITIONER

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March 1, 1995

QUESTION PRESENTED

Whether a prisoner serving a series of consecutive sentences remains "in custody" for purposes of 28 U.S.C. § 2241(c)(3) throughout the aggregate duration of those sentences, and, if so, whether the court below erred in holding that it lacked jurisdiction to hear petitioner's challenge to the first of two consecutive sentences.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 29 F.3d 216 (5th Cir. 1994). (Joint Appendix ("JA") at 25.) The opinion of the district court, issued June 3, 1992, is not reported. (JA at 18.)

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit were entered on August 19, 1994. The Petition for Writ of Certiorari was filed pro se on November 7, 1994, with accompanying motion for leave to proceed in forma pauperis. The petition and the motion to proceed in forma pauperis were granted

on January 20, 1995. On further motion of Petitioner, counsel was appointed on January 23, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1993).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 28 U.S.C. § 2241(c) (3); 28 U.S.C. § 2254; Miss. Code Ann. § 47-5-138; Miss. Code Ann. § 47-5-139; Miss. Code Ann. § 47-5-142; and Miss. Code Ann. § 47-7-3(1), are reproduced in Appendix A hereto.

STATEMENT OF THE CASE

On September 16, 1985, before Judge Eubanks of the Circuit Court of Lamar County, Mississippi, Petitioner Harvey F. Garlotte entered simultaneous guilty pleas to one count of possession of marijuana with intent to deliver and two counts of murder. These pleas were entered pursuant to an agreement with the State to reach a global resolution of all outstanding criminal charges against Garlotte.[1]

Under the plea agreement, the State of Mississippi recommended that Garlotte be sentenced to a consecutive term of three years on the marijuana count and to two concurrent life sentences on the murder counts. (JA at 43.) Apparently recognizing that Garlotte's actual time in prison would be based upon the entire duration of his consecutive sentences, the District Attorney openly expressed indifference concerning Judge Eubanks' tentative suggestion that Garlotte's life sentences be served prior to the three-year marijuana sentence: "Either that way, your Honor or allow the three years to run first. In other words, we're just talking about a total of three years and then life or life and then three years." (JA at 43.)

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[1] In his habeas petition, Garlotte alleges that the terms of his negotiated plea agreement were misrepresented to him. (JA at 6.)

The trial court ultimately directed that Garlotte's concurrent life sentences run "consecutive, and after" the three-year marijuana sentence. (JA at 50.)

On April 20, 1986, Garlotte sent a letter to the trial court requesting that his guilty plea on the marijuana count be vacated. (JA at 51.) The court responded to this request with a letter advising Garlotte of the proper procedures for seeking post-conviction relief. (JA at 51.) On September 25, 1986, Garlotte submitted a motion to the Clerk of the Circuit Court of Lamar County, Mississippi, seeking to have his marijuana conviction vacated. A denial was filed on November 3, 1986. Garlotte then filed a timely appeal to the Mississippi Supreme Court. Nearly two years later, on August 10, 1988, the court rejected petitioner's appeal without a hearing. *See Garlotte v. State*, 530 So. 2d 693 (Miss. 1988).[2] Further post-conviction motions filed by Garlotte were denied by the Mississippi Supreme Court on January 18, 1989.

On October 6, 1989, Garlotte filed a petition for a writ of habeas corpus with the United States District Court for the Southern District of Mississippi, Hattiesburg Division. After an initial skirmish over whether Garlotte had properly exhausted his state remedies as required by 28 U.S.C. § 2254(b), a federal magistrate judge recommended that the petition be denied on the merits. (JA at 5.) The magistrate took this action without holding a hearing, and without even requesting Respondent to make a submission on the merits of Garlotte's petition. Over Garlotte's objection, the district court adopted the magistrate's recommendation and, on June 3, 1992, issued an order and judgment dismissing the petition. (JA at 18, 19.)

Shortly thereafter, the Court of Appeals for the Fifth Circuit granted Garlotte's request for a certificate of prob-

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[2] The Mississippi Supreme Court denied rehearing on September 28, 1988.

able cause to appeal,[3] observing that "Rule 4 of the Rules Governing Section 2254 Cases permits [a] district court to dismiss [a] petition without requiring the state to respond only if the claims are frivolous, or it appears from the face of the petition that the petitioner is not entitled to relief." (JA at 23.) In the court of appeals, Respondent argued for the first time that under this Court's decision in *Maleng v. Cook*, 490 U.S. 488 (1989), the court lacked jurisdiction over Garlotte's petition because Garlotte's "custody" under the marijuana conviction had assertedly ended.[4] Garlotte countered that his sentence for the marijuana conviction was imposed consecutively with respect to his life sentences for murder, and that it continued to postpone the date on which he would be initially eligible for release on parole. Accordingly, Garlotte urged that he was "in custody" for jurisdictional purposes under this Court's decision in *Peyton v. Rowe*, 391 U.S. 54 (1968).

The Fifth Circuit adopted Respondent's view of *Maleng*, and dismissed Garlotte's petition without addressing the merits of his constitutional claims. *See Garlotte v. Fordice*, 29 F.3d 216 (5th Cir. 1994). (JA at 25.) The court began by artificially segregating Garlotte's three-year marijuana prison term from the sentences imposed on the remaining counts, over Garlotte's objection that Mississippi law treats his consecutive prison terms as an aggregate term for all relevant purposes. On the basis of this segregation, the court declined to follow *Peyton*'s holding that "a petitioner who [is] serving consecutive sentences imposed by the state court is 'in custody' under any one of those sentences," *id.* at 218 (citing *Peyton*, 391 U.S. at 67), noting that "the petitioners in *Peyton* were chal-

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[3] The district court had earlier rejected Garlotte's request for a certificate of probable cause. *See Garlotte*, 29 F.3d at 217.

[4] "The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3) (1994).

lenging a sentence they had not yet begun to serve," *id.* It termed the delay in Garlotte's initial parole eligibility caused by the challenged marijuana conviction a mere "collateral consequence" of what it described as a "fully expired" conviction. *Id.* at 218 (quoting *Maleng*, 490 U.S. at 91). The court of appeals thus dismissed the petition for lack of subject matter jurisdiction.

SUMMARY OF ARGUMENT

Because the sentence Garlotte challenges in his habeas petition was imposed consecutively with respect to other sentences, and because he remains confined by the State of Mississippi under the aggregate term of those sentences, Garlotte's petition satisfies the jurisdictional prerequisite under 28 U.S.C. § 2241(c)(3) that he be "in custody" under the challenged conviction. The Fifth Circuit misapplied two of this Court's decisions—*Peyton v. Rowe*, 391 U.S. 54 (1968) and *Maleng v. Cook*, 490 U.S. 488 (1989)—in reaching the contrary conclusion.

In *Peyton*, this Court held that a prisoner serving consecutive sentences is " 'in custody' under any one of them for purposes of § 2241(c)(3)." 391 U.S. at 67 (footnote omitted). Although that case involved a habeas challenge to a consecutive sentence that the petitioner had not yet begun to serve, the rationale advanced in *Peyton* was not limited to challenges to future consecutive sentences. Rather, *Peyton* was grounded in the notion that consecutive sentences are so interwoven that, for all practical purposes, they direct a unitary period of confinement. Where sentences are imposed consecutively, the duration and continuing validity of the earlier sentences determine the timing under which any later sentences are served. And where, as here, consecutive prison terms have been imposed simultaneously by the same court, the inference is especially strong that the prisoner has received a unitary sentence.

The Mississippi penal code amply confirms that Garlotte's consecutive sentences effectively command a single

term of confinement. For such penological purposes as commutation and parole eligibility, the order of each of Garlotte's discrete consecutive sentences makes no difference under Mississippi law. It is thus not surprising that the District Attorney expressed indifference at Garlotte's sentencing as to the sequence in which Garlotte would be required to serve his consecutive sentences. The unitary treatment of Garlotte's consecutive sentences under Mississippi law also explains how the Mississippi Department of Corrections, in two separate actions following the date on which Garlotte assertedly "discharged" his marijuana sentence, could have made adjustments to that sentence. In view of the treatment Mississippi law accords Garlotte's consecutive sentences for penological purposes, it would be profoundly unfair to make Garlotte's right to avail himself of the writ of habeas corpus turn on the fortuity of the order in which he was required to serve those sentences in the judgment and commitment order.

Maleng does not require, or even suggest, a contrary result. *Maleng* holds simply that a habeas petitioner is not rendered "in custody" under a totally independent and already discharged conviction simply because that conviction has been used collaterally to enhance the length of a sentence imposed for a subsequent crime. 490 U.S. at 492-93. It has no application in the context of consecutive sentences imposed by the same jurisdiction, where each such sentence directly imposes present restraints on the prisoner's freedom throughout the prisoner's aggregate term of confinement. Unlike the petitioner in *Maleng*, Garlotte does not challenge the marijuana conviction's "enhancement" of his life sentences, but rather seeks to arrest that conviction's postponement of his possible release by delaying the life sentences' asserted commencement date. Because *Maleng* forecloses habeas jurisdiction only with respect to "fully expired" sentences whose continuing custodial significance is limited to their consideration as a basis for enhancing sentences for subsequent crimes, *see Maleng*, 490 U.S. at 492, Garlotte

remains "in custody" under the authority of his marijuana conviction for purposes of § 2241(c)(3).

ARGUMENT

Pursuant to 28 U.S.C. § 2241(c)(3), the federal courts have jurisdiction to issue writs of habeas corpus on behalf of prisoners who are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3) (1994). Consistent with the text of this provision, the habeas petitioner's custodial status has long been interpreted to be a threshold jurisdictional requirement. Nevertheless, as this Court has noted, "[w]hile limiting [the writ's] availability to those 'in custody,' the statute does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used." *Jones v. Cunningham*, 371 U.S. 236, 238 (1963).

This Court has "interpreted [§ 2241(c)(3)] as requiring that the habeas petitioner be 'in custody' under the conviction or sentence under attack at the time his petition is filed." *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989) (citation omitted). In concluding that Garlotte was not so confined, the court of appeals both misapprehended the nature and operation of Garlotte's consecutive sentences and misapplied *Maleng*. Because Garlotte's current custodial status is directly determined by each of the consecutive sentences imposed on him, he must be considered to be "in custody" under each of those sentences for as long as he remains confined. *See Peyton v. Rowe*, 391 U.S. 54, 67 (1968). This inherent quality of consecutive prison terms renders *Maleng* wholly inapplicable to cases like Garlotte's, a fact recognized by several courts of appeals. *See Fawcett v. Bablitch*, 962 F.2d 617 (7th Cir. 1992); *Bernard v. Garraghty*, 934 F.2d 52 (4th Cir. 1991); *Fox v. Kelso*, 911 F.2d 563 (11th Cir. 1990); *but see Johnson v. O'Dea*, No. 92-6063, 1994 U.S. App. LEXIS 3160 (6th Cir. Feb. 18, 1994) (unpublished) (jurisdiction unavailable to attack first of two

consecutive sentences); *Allen v. Dowd*, 964 F.2d 745 (8th Cir.) (*Maleng* held to preclude jurisdiction), *cert. denied*, 113 S. Ct. 335 (1992). *But cf. United States v. Bustillos*, 31 F.3d 931 (10th Cir. 1994) (jurisdiction unavailable to attack first of two consecutive sentences in § 2255 proceeding).

I. FOR PURPOSES OF 28 U.S.C. § 2241(c)(3), A PRISONER SERVING CONSECUTIVE PRISON TERMS ON SEPARATE COUNTS OF CONVICTION IS "IN CUSTODY" THROUGHOUT THE AGGREGATE DURATION OF THOSE TERMS.

In *Peyton*, this Court held that a prisoner serving consecutive sentences is " 'in custody' under any one of them for purposes of § 2241(c)(3)." 391 U.S. at 67 (footnote omitted). This holding rests on the principle that consecutive sentences imposed by the same jurisdiction effectively command a single period of confinement. This principle applies whether, as in *Peyton*, the petitioner technically has yet to begin serving the prison terms imposed on the challenged counts of conviction or, as here, the petitioner has technically served the prison term imposed on the challenged count but has not yet completed his scheduled confinement. The Fifth Circuit erred by failing to give full recognition to this longstanding principle, and in finding that principle insufficient to sustain jurisdiction over Garlotte's habeas petition.

A. Consecutive Sentences Must Be Aggregated For Purposes Of Applying § 2241(c)(3)'s "In Custody" Requirement.

Consecutive sentences of imprisonment are, for all practical purposes, unitary. Under the controlling decisions of this Court, a challenge to any of the convictions underlying consecutive sentences satisfies the "in custody" requirement of 28 U.S.C. § 2241(c)(3) as long as the petition is brought during the prisoner's aggregate term of confinement.

This principle was first endorsed in the Court's landmark decision in *Peyton*. There, the Court stated flatly that a prisoner serving consecutive sentences is " 'in custody' under any [of those sentences] for purposes of § 2241(c)(3)." 391 U.S. at 67 (footnote omitted). Ruling that the writ was available to test the constitutionality even of a sentence that the petitioner had not technically begun serving, the Court reasoned:

> [I]n common understanding "custody" comprehends respondents' status for the entire duration of their imprisonment. Practically speaking, [respondent] Rowe is in custody for 50 years, or for the aggregate of his 30- and 20-year sentences. For purposes of parole eligibility, under Virginia law he is incarcerated for 50 years. . . . Nothing on the face of § 2241 militates against an interpretation which views [respondents] as being "in custody" under the aggregate of the consecutive sentences imposed on them.

Id. at 64 (citations omitted). Under the principle of *Peyton*, § 2241(c)(3)'s jurisdictional grant thus extends to "any one" of a prisoner's consecutive sentences that, together, order a continuous period of confinement. *See id.* at 67.

As suggested by the *Peyton* Court, *see id.* at 64, it would be inconsistent with the practical realities of criminal sentencing to forge an artificial separation of consecutive terms for purposes of applying the "in custody" requirement. To the prisoner on whom consecutive sentences have been imposed, the duration of each discrete sentence in the consecutive sequence is immaterial. For such a prisoner, only the aggregate period he or she has been ordered to spend behind bars holds any practical relevance. Likewise, where consecutive sentences are imposed by a single jurisdiction, the order in which the prisoner has been directed to fulfill those sentences is of no significance, as conditions of confinement ordinarily do not change as a consecutive prison term on one count is technically completed and another begun.

In a fundamental sense, consecutive sentences are unitary, as the duration and continuing validity of the earlier sentences determine the timing under which any later sentences are served. *See, e.g., Blitz v. United States*, 153 U.S. 308, 318 (1894) (where first of two consecutive sentences is vacated, second sentence held to commence on date of imposition, rather than on date of vacatur).[5] As Judge Easterbrook noted in the Seventh Circuit's recent decision on this issue, the commencement dates of subsequent sentences imposed consecutively are not fixed, but rather are keyed to the status of prior sentences in the sequence. *See, e.g., Fawcett*, 962 F.2d at 618 ("a consecutive sentence uses the first conviction to postpone release on the second"); *see also Fox*, 911 F.2d at 567-68 ("The misdemeanor sentences that Fox served delayed the date from which he will receive credit for time served against the felony convictions under which he is currently incarcerated."). Each sentence imposed consecutively remains equally determinative of the only important event for the prisoner (and for the De-

[5] The rule pronounced in *Blitz*—that where the first of two consecutive sentences is vacated, the second sentence is considered to have commenced as of the date it was imposed (with the prisoner receiving credit for any time served after that date)—is widely observed in federal and state courts. *See Johnson v. Henderson*, 455 F.2d 983, 984 (5th Cir. 1972) (where first consecutive sentence was vacated in habeas proceeding, second sentence held to begin at date of imposition); *Goodwin v. Page*, 418 F.2d 867, 868 (10th Cir. 1969) (same); *Hoffman v. United States*, 244 F.2d 378, 380 (9th Cir. 1957) (same); *Brown v. Commissioner of Corrections*, 147 N.E.2d 782, 784-85 (Mass. 1958) (same); *Green v. State*, 245 A.2d 147, 149-50 (Me. 1968) (same); *Potter v. State*, 139 S.E.2d 4, 5 (N.C. 1964) (same); *see also Meadows v. Blackwell*, 433 F.2d 1298, 1299 (5th Cir. 1970) (habeas petitioner entitled to credit for "time served on an invalid sentence at a time when a presently existing sentence could have been served"). In fact, Garlotte has located no case, federal or state, which has denied a prisoner such credit where, as here, the consecutive sentences were imposed by the same jurisdiction simultaneously. At least one federal court has suggested that the Constitution may require a state to credit time served under a vacated sentence in this manner. *See Goodwin*, 418 F.2d at 868.

partment of Corrections)—the date of his release from confinement.

The singularity of consecutive sentences is particularly pronounced where, as here, those sentences have been imposed simultaneously by a single court in a consolidated proceeding. To be sure, even when consecutive sentences are imposed in separate proceedings, a state's election to proceed with consecutive rather than concurrent terms of imprisonment reflects its intention to make the timing of the later terms dependent upon completion of the former.[6] But where consecutive sentences have been imposed simultaneously by the same court, the inference that the prisoner has been given a "package deal" for his offenses—in effect, an aggregate period of incarceration—is all the more clear. *Cf. Warden v. Marrero*, 417 U.S. 653, 658 (1974) ("it [cannot] be seriously argued that sentencing decisions are made without regard to the period of time a defendant must spend in prison before becoming eligible for parole").[7] An aggregate term of imprisonment was

[6] At common law, multiple criminal sentences were presumed to run concurrently unless otherwise specifically stated. *See* WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS § 376, at 534-35 (1893); *see, e.g., United States v. Remus*, 12 F.2d 239, 239-40 (6th Cir.), *cert. denied*, 271 U.S. 689 (1926); *see also James v. Ward*, 59 Ky. (2 Met.) 271, 274-75 (1859) (courts are without power to impose consecutive sentences absent statutory grant of authority).

[7] Indeed, the practice of imposing consecutive sentences for multiple criminal offenses developed largely as a more administrable and precise alternative to the use of concurrent or general sentences. The earliest British case to discuss the purposes of consecutive sentencing, *Rex v. Wilkes*, 19 How. St. Tr. 1075, 1132-35 (K.B. 1770), describes the practice as offering significant advantages over the imposition of a single term, and over the imposition of concurrent sentences of different length, in the event one of the convictions is thereafter disturbed; in such circumstances, the opinion explains, the contribution of the remaining valid conviction to the overall term of confinement can readily be determined. *See id.* at 1133-34. In this country as well, the use of consecutive sentences (over general sentences) has been encouraged in order to facilitate adjustment of prisoners' confinement in circumstances

certainly what Garlotte bargained for when he entered into plea negotiations with respect to all of the Mississippi criminal charges pending against him in 1985, and the sentencing judge certainly treated the plea arrangement as such.

In spite of these considerations, the Fifth Circuit artificially segregated Garlotte's consecutive terms of confinement based upon the fortuity of the order in which the terms appeared in the trial court's judgment and commitment order. In the process, the court restrictively construed *Peyton* to apply only in circumstances where the sentence under review has not yet technically commenced. *Garlotte*, 29 F.3d at 218. This construction of § 2241 (c)(3) elevates form over substance. It ignores the practical reality—recognized in *Peyton*—that when consecutive sentences are imposed, the prisoner remains "in custody" throughout the aggregate duration of his or her confinement.

More fundamentally, the reasoning of the court below is inconsistent with the logic of *Peyton*. Inasmuch as the habeas petitioners in *Peyton* were not yet technically serving the sentences they sought to challenge, they were not presently subject to any discrete restraints from the underlying convictions.[8] Rather, they were "in custody" for

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where one or more of the underlying convictions is invalidated. *See, e.g., Neely v. United States*, 2 F.2d 849, 853 (4th Cir. 1924) ("[T]he better practice is for the trial court . . . to apply the punishment it awards to the separate counts upon which the prisoners have been convicted . . . , [as] a much simpler problem will be presented to the appellate court, in the event that . . . error has been committed as to the issue raised by some, but not by all, of the counts."); *Vandegrift v. State*, 171 A.2d 713, 715 (Md. 1961) (same).

[8] Notably, one of the *Peyton* Court's justifications for its jurisdictional holding—the concern that, absent a rule of aggregation, a prisoner who is ultimately successful would have to suffer unconstitutional confinement under the challenged conviction for some period of time while the petition is addressed, *see Peyton*, 391 U.S. at 64—implicitly recognizes that a prisoner challenging a "future" consecutive sentence is not subject to any present restraints by

purposes of § 2241(c)(3) only in the sense that the challenged convictions determined the overall length of their period of continuous confinement. As this Court has tacitly recognized, *see Blitz*, 153 U.S. at 318, the same is true of a consecutive sentence which has technically been served. Whereas an "unserved" consecutive sentence encumbers the prisoner's future liberty, a completed consecutive sentence represents a continuing claim on the petitioner's freedom by postponing the date from which any subsequent sentences run. *See, e.g., Fawcett*, 962 F.2d at 618.[9] The effects of each of a series of consecutive sentences on the timing of a prisoner's release from confinement simply cannot be separated.[10]

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virtue of that sentence alone. *See Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1090-91 (1970).

[9] True, the Court in *Peyton* believed it important to permit challenges to "unserved" consecutive sentences in part to ensure that "[m]eaningful factual hearings on alleged constitutional deprivations [could] be conducted before memories and records grow stale." 391 U.S. at 65. But that policy rationale was not cited (nor could it have been cited) as a basis for extinguishing the statutory "in custody" requirement in such circumstances, but rather was cited only as an additional ground for treating consecutive sentences as unitary for habeas purposes. Clearly, the relevance of *Peyton's* jurisdictional rule for aggregating consecutive sentences should not depend upon the applicability of such an untethered policy rationale.

[10] The connection between earlier and later consecutive sentences is no less direct where one of the sentences carries a life term, in that a successful challenge to a prior fixed term will advance the life sentence's commencement date. Such an advancement can bring significant advantages to the prisoner. For instance, because Garlotte's life sentences include the possibility of parole, a successful challenge to his three-year marijuana term will hasten the date on which he is first eligible for release from confinement. *See infra* note 14; *compare Peyton*, 391 U.S. at 56 n.3 (noting that successful challenge to consecutive sentence not yet served would have the effect of advancing prisoner's parole eligibility date under the remaining sentences). In this regard, it bears noting that the availability and timing of parole have long been understood to be material to an assessment of the quantum of punishment visited upon an offender. *See Solem v. Helm*, 463 U.S. 277, 303 (1983) (life sentence without

Because Garlotte's single three-year term and his two life terms were imposed consecutively by the State of Mississippi, and because each such term remains instrumental in determining the date on which his continuous period of confinement may end, *Peyton* instructs that Garlotte is "in custody" under each of those sentences for the duration of his imprisonment.[11]

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possibility of parole for three nonviolent felonies held to violate Eighth Amendment's proportionality principle); *Rummel v. Estelle*, 445 U.S. 263, 266-67, 280-81 (1980) (life sentence with possibility of parole for nonviolent recidivist held not to violate Eighth Amendment); *see also Warden v. Marrero*, 417 U.S. at 663 ("a repealer of parole eligibility previously available to imprisoned offenders would present [a] serious question under the *ex post facto* clause").

[11] Prior to *Maleng*, this was the uniform view among the courts of appeals. *See, e.g., McCoy v. Wainwright*, 804 F.2d 1196 (11th Cir. 1986); *Harrison v. Indiana*, 597 F.2d 115 (7th Cir. 1979); *Lyons v. Brierly*, 435 F.2d 1214 (3d Cir. 1970); *Thacker v. Peyton*, 419 F.2d 1377 (4th Cir. 1969); *Cappetta v. Wainwright*, 406 F.2d 1238 (1969), *overruled, Garlotte v. Fordice*, 29 F.3d 216 (5th Cir. 1994). Indeed, even before *Peyton* issued, when the rule of *McNally v. Hill*, 293 U.S. 131 (1934), prevented prisoners from challenging consecutive sentences they were scheduled to serve in the future, federal courts permitted challenges to consecutive sentences under 28 U.S.C. § 2241(c)(3) that had already technically been served. *See, e.g., Tucker v. Peyton*, 357 F.2d 115, 117-18 (4th Cir. 1966); *see also Russell v. United States*, 306 F.2d 402, 405 (9th Cir. 1962) (motion under 28 U.S.C. § 2255).

Notably, most state courts which aggregate consecutive sentences in the context of state collateral review proceedings permit prisoners serving consecutive sentences to challenge a prior conviction even if the prisoner has technically completed the sentence for the conviction at issue. *See In the Interest of W.B.*, 428 So. 2d 309, 312 (Fla. Dist. Ct. App. 1983) (noting with approval that " 'there are circumstances in which a prisoner may use habeas corpus to attack the validity of some earlier sentence that he has already served' " (quoting 17 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4262 (1978))); *Parris v. State*, 208 S.E.2d 493, 496 (Ga. 1974) ("The mere fact that the [consecutive] state sentence has been completely served should no longer be a bar to attacking it through habeas corpus even though the petition is not initially filed until after the sentence is

B. Mississippi Law Confirms That Garlotte Is Presently "In Custody" Under Each Of The Consecutive Sentences Imposed On Him.

In *Peyton*, the Court reached the conclusion that "a prisoner serving consecutive sentences is 'in custody' under any one of them" not only in light of the unitary quality of consecutive sentences, but also because the relevant state law treated such sentences as a single aggregate sentence for penological purposes. *Peyton*, 391 U.S. at 67; *see id.* at 64. Here, as in *Peyton*, the State's penal code treats consecutive sentences as a unitary term of confinement. While the question whether a prisoner is "in custody" under § 2241(c)(3) is federal in nature, this state-law treatment provides additional compelling support for the conclusion that Garlotte is currently confined in part under the direct authority of his marijuana conviction.

When consecutive sentences are imposed in Mississippi, the prisoner's release date and other penological consequences turn on the prisoner's aggregate scheduled confinement, not on the duration of each sentence individually or on the order in which the prisoner was required to serve them. To wit, the Mississippi Code specifically provides that "[a]n offender under two . . . or more consecutive sentences shall be allowed commutation based upon *the total term* of the sentences." [12] Miss. Code Ann.

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completed."); *cf. Commonwealth ex rel. Alexander v. Rundle*, 214 A.2d 304, 305 (Pa. Super. 1965) (allowing an inmate to attack "the first sentence on which he is on 'constructive' parole, while serving the second or later sentence" (footnote omitted)).

[12] The term "commutation" refers to reductions in the length of a prisoner's confinement based on the application of earned time credits. *See* Miss. Code Ann. §§ 47-5-138, 47-5-139 (1993). Because earned time credits can be forfeited under Mississippi law, *see id.* § 47-5-138(2) ("An inmate may forfeit all or part of his earned time allowance for a serious violation of rules"), the fact that such credits are determined on the basis of "the total term of [any consecutive] sentences"—rather than individually with

§ 47-5-139(2) (1993) (emphasis added). The parole eligibility of a prisoner confined under consecutive sentences is determined in similar fashion, and is generally a function of the total duration of the prisoner's scheduled confinement. Thus, the Code provides that "[e]very prisoner . . . who has served not less than one-fourth (¼) of *the total of such term or terms* for which such prisoner was sentenced . . . may be released on parole as hereinafter provided." *Id.* § 47-7-3(1) (1993) (emphasis added).[13]

Admittedly, because Garlotte's consecutive sentences include two concurrent life terms that together carry a statutory minimum ten-year period of incarceration, *see id.* (imposing 10-year minimum prison term for life sentences), the law requires that he complete that minimum period of service along with the minimum confinement specified for his three-year marijuana term prior to becoming eligible for parole. *See, e.g., Williams v. Puckett*, 624 So. 2d 496, 498-99 (Miss. 1993) (statutory mini-

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respect to each separate term—is of crucial significance, as a prisoner cannot lock in any earned time credits he or she has been assigned until discharged from confinement altogether. Thus, a prisoner serving consecutive five-year terms in Mississippi might receive as many as two and one-half years' worth of earned time credits by the so-called "discharge date" of his or her first term, but nevertheless would risk forfeiture of those credits, along with any credits thereafter earned, throughout the duration of the second term. *See Post v. Ruth*, 354 So. 2d 1111, 1113 (Miss. 1978) ("earned time does not become vested until the prisoner is entitled to be discharged after receiving credit for good time").

[13] Counsel for Respondent acknowledged this fact in an opinion letter less than two years ago, advising that "the Department of Corrections should compute parole eligibility pursuant to subsection (1)(c) of [Mississippi Code] section 47-7-3, by combining the total of consecutive sentences whenever the prisoner has accrued any meritorious earned time allowances." Opinion Letter from Mike Moore, Mississippi Attorney General, to Eddie Lucas, Commissioner of the Mississippi Department of Corrections, 1993 WL 294305 (Miss. A.G. July 21, 1993).

mum period of incarceration under robbery conviction must be added to required service time for forgery conviction in determining initial parole eligibility date).[14] This limited respect in which Garlotte's consecutive sentences are individuated under Mississippi law only underscores their functional unity, however, as it is clear (at least for purposes of Mississippi's parole statutes) that Garlotte will become eligible for release without having completed service of *either* his three-year marijuana sentence *or* his follow-on life sentences. Under Mississippi law, after ten years and ten months in prison—ten years of which must be attributed to his life sentences, *see* Miss. Code Ann. § 47-7-3(1) (1993) (prior to becoming eligible for parole, prisoner sentenced to life imprisonment must serve "not less than ten (10) years of such life sentence")—Garlotte will become parole-eligible. *See* note 14, *supra*. Yet at this crucial threshold of parole eligibility, he will technically remain saddled with a six-month

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[14] According to his Sentence Computation Record, Garlotte received six months' worth of "meritorious earned time" credits on the marijuana conviction. (Meritorious earned time credits are earned in connection with the completion of approved educational and work projects, Miss. Code Ann. § 47-5-142(2), and, unlike earned time for good conduct, can be applied to advance a prisoner's initial parole eligibility date, Miss. Code Ann. § 47-7-3(1)(c).) The Department of Corrections purported to apply this entire period to advance both Garlotte's discharge date *and* his parole eligibility date (the latter to December 2, 1995). (JA at 54) However, as Garlotte pointed out in both his petition and his briefs to the court below, Miss. Code Ann. § 47-7-3(1)(c) mandates that he serve at least ten months on the marijuana conviction prior to being released on parole, any meritorious earned time credits notwithstanding.

Thus, if Garlotte is unable to challenge his marijuana conviction, it appears that he will not become eligible for parole until March 31, 1996—ten years and ten months following the commencement of his confinement. (If, on the other hand, Garlotte's habeas corpus petition is granted and his marijuana conviction is ruled unconstitutional, his initial parole eligibility date will advance to June 1, 1995 (one year minus the meritorious earned time credits awarded in connection with his marijuana sentence).)

service obligation on the marijuana sentence in addition to the remainder of his concurrent life terms. For purposes of calculating Garlotte's possible release date on parole, Garlotte's consecutive sentences are essentially being discharged in dovetailed fashion.

Perhaps most significantly, Garlotte's parole eligibility date would have been the same even if the sequence in which Garlotte was required to serve his consecutive sentences were reversed. That is, had the marijuana sentence ostensibly been tacked on at the end of his concurrent life sentences, his minimum parole eligibility date would still have been a function of the combined minimum terms of incarceration for each sentence consecutively imposed. He would thus have become parole-eligible by early 1996 (as is the case now), even though, technically speaking, he would not have begun serving his marijuana sentence at all. It was perhaps for this reason that the District Attorney expressed indifference when the trial court proposed to have Garlotte's concurrent life sentences precede the marijuana sentence: "Either that way, your Honor or allow the three years to run first. In other words, we're just talking about a total of three years and then life or life and then three years." (JA at 43.) It would be profoundly unfair to deny Garlotte his day in federal court on the marijuana conviction where the order in which his consecutive sentences were to be served was so arbitrary,[15] and where no penological consequences turn on that sequence under the governing state law.

In any event, the State's administration of Garlotte's consecutive sentences belies its jurisdictional argument, and confirms that Garlotte's custody under his marijuana sentence survived its asserted "expiration." On Novem-

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[15] In fact, Mississippi courts often impose consecutive life sentences in advance of fixed-term sentences on multiple criminal counts. *See, e.g., Burrell v. State*, 613 So. 2d 1186 (Miss. 1993); *Meeks v. State*, 604 So. 2d 748 (Miss. 1992); *Luckett v. State*, 582 So. 2d 428 (Miss. 1991).

ber 13, 1992, the Mississippi Department of Corrections recomputed Garlotte's marijuana sentence. (JA at 53, 54.) The Department took this action in order to apply "meritorious earned time credits," *see* Miss. Code Ann. § 47-5-142 (1993), and Garlotte's Sentence Computation Record, as revised, clearly reflects the modest advancement in his parole eligibility date that this late-breaking award of credits occasioned. (JA at 54.) Similarly, the Department of Corrections credited Garlotte with substantial earned good time credits in 1992 pursuant to a recently enacted amendment to Mississippi's earned time statute. (JA at 54.)[16]

In short, just as in *Peyton*, Garlotte is subject to consecutive sentences that are for all intents and purposes unitary. In part as a function of Mississippi law, he faces an aggregate term of life imprisonment in which each of the consecutive sentences imposed on him are instrumental in determining the timing of his release from confinement. *See, e.g., Armstrong v. State*, 618 So. 2d 88, 90 (Miss. 1993) (noting inability of State to prove where one consecutive sentence ends and another begins).

II. *MALENG v. COOK* FORECLOSES JURISDICTION ONLY OVER CONVICTIONS THAT NO LONGER IMPOSE ANY PRESENT RESTRAINTS UPON THE HABEAS PETITIONER.

The Fifth Circuit acknowledged that Garlotte was imprisoned under consecutive sentences within the meaning of *Peyton*, but nevertheless found this Court's recent decision in *Maleng* to preclude a federal collateral challenge to Garlotte's marijuana conviction because that sentence had assertedly "expired." *Garlotte*, 29 F.3d at 217. This was error.

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[16] These earned good time credits could not have been directed to Garlotte's life sentences for the simple reason that prisoners confined under such sentences are not statutorily eligible for such credits. *See* Miss. Code Ann. § 47-5-139(1)(a).

The "question presented" in *Maleng*—"whether a habeas petitioner remains 'in custody' under a conviction after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted"—makes abundantly clear that the decision has no relevance in the context of consecutive prison terms, where each such term remains instrumental in determining the prisoner's release date. *Maleng*, 490 U.S. at 492. Garlotte's marijuana conviction and sentence continue directly to impose a "present restraint" on his freedom. *Id.* That is what distinguishes Garlotte's challenge from the respondent's petition in *Maleng*, and that is what the Fifth Circuit overlooked.

In *Maleng*, respondent Cook had been convicted of robbery in 1958 and was sentenced by a Washington state court to a 20-year term of imprisonment. *Id.* at 489. In 1978, following the expiration of Cook's 1958 sentence, a Washington state court sentenced Cook to two life terms and one 10-year term on three convictions earned in 1976 while on parole from his 1958 sentence. *Id.* Under Washington law, Cook's 1958 robbery conviction was cited by the sentencing judge as a basis for lengthening his confinement under the 1978 sentences. *Id.* In 1985, Cook filed a petition for habeas corpus attacking his 1958 robbery conviction, but this Court held that Cook's sentence under that conviction had "fully expired," and that he was therefore no longer "in custody" under that conviction for purposes of 28 U.S.C. § 2241(c)(3). *Id.* at 492. According to the Court, the 1978 sentence enhancement was a mere "collateral consequence" of the 1958 conviction, and betrayed the fact that Cook's real quarrel was with the 1978 sentence as enhanced by the 1958 conviction, not with the 1958 conviction itself. *Id.* at 492-93.[17]

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[17] For that reason, the Court held that habeas jurisdiction lay for Cook to challenge the 1978 sentence on the basis that it had

It is clear from this Court's discussion in *Maleng* that Cook's "fully expired" 1958 robbery conviction was not directly determinative of his custodial status under his 1978 sentences; he suffered no "present restraint" therefrom. *Id.* A successful collateral challenge to that earlier conviction would have had no direct effect on the length of the subsequent sentences imposed upon him. Rather, only by thereafter petitioning for a reopening of the 1978 sentencing, or by bringing a collateral challenge to the 1978 sentence directly, would Cook have been able to affect his custodial status. *See, e.g., United States v. Tucker*, 404 U.S. 443, 444-45 (1972).

But *Peyton* establishes that when a prisoner is sentenced to a series of consecutive terms, he suffers a present restraint with respect to all such sentences throughout their aggregate duration.[18] That is, the first of two consecutive sentences does not "fully expire[]" until the prisoner is discharged from confinement altogether. Unlike the enhancement of Cook's 1978 sentence occasioned by his earlier conviction, an enhancement that was collateral in effect, the delay in the commencement of Garlotte's life sentences—and the concomitant delay in Garlotte's parole eligibility date—constitute continuing custodial effects of the marijuana sentence *itself* and not simply an enlargement of his subsequent life sentences. If Garlotte is successful in challenging his marijuana conviction, his parole eligibility date will be advanced through the direct operation of Mississippi law on the aggregate term of confinement. *See* Opinion Letter from Bill Allain, Mis-

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unconstitutionally been enhanced by the assertedly invalid 1958 conviction. *Id.* at 493-94.

[18] As noted above, *see* pp. 8-14 *supra*, *Peyton* recognized that where sentences are imposed consecutively, they are treated as a single aggregate sentence for many important purposes such as parole eligibility. As a result, it is impossible to determine where one sentence ends and a second begins. Where sentences are not consecutive, as in *Maleng*, the lines of demarcation between them are clear.

sissippi Attorney General, to John L. Hopkins, General Counsel to the Mississippi Department of Corrections, 1982 WL 44423 (Miss. A.G. May 3, 1982) (where first of two consecutive sentences is vacated, second sentence begins at date of imposition as if first sentence had never existed). Thus, unlike the earlier, discontinuous sentence at issue in *Maleng*, Garlotte's consecutively imposed marijuana sentence has not "fully expired" for purposes of 28 U.S.C. § 2241(c)(3).

In *Bernard v. Garraghty*, the Fourth Circuit applied this reasoning to sustain habeas jurisdiction over a petition indistinguishable in material respects from Garlotte's:

> Bernard's situation is quite distinct from Cook's [in *Maleng*] and similar in all relevant respects to Rowe's [in *Peyton*]. Bernard's sentences, like Rowe's, were imposed to be served consecutively. Unlike Cook, Bernard remained in physical custody of the Commonwealth at the time of filing his petition—custody that has never been interrupted since he began serving the consecutive sentences. . . . The Court's finding that Cook was no longer "in custody" for purposes of challenging his first conviction because he suffered no restraint on liberty from that sentence at the time of his challenge is consistent with *Peyton*'s determination that a sentence is not "fully expired" until the restraint from that sentence has terminated.

Bernard, 934 F.2d at 54-55.[19] Thus, the Fourth Circuit recognized that, when read together, *Peyton* and *Maleng* dictate the result sought by Garlotte in this case.

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[19] As earlier emphasized, Garlotte is not alone in taking the position that a federal court may consider a prisoner's habeas challenge to the first of two consecutive sentences, even where that sentence has technically expired. In decisions rendered after *Maleng*, the Fourth, Seventh and Eleventh Circuits have all held that federal habeas jurisdiction exists in circumstances indistinguishable from those here. *See* p. 7 *supra*.

Maleng simply has no application where, as with sentences imposed consecutively, the prisoner continues to suffer a "present restraint" from the conviction under challenge. The Fifth Circuit erred in concluding otherwise.

III. RECOGNITION OF HABEAS JURISDICTION OVER THE EARLIER OF GARLOTTE'S CONSECUTIVE SENTENCES IS CONSISTENT WITH THE REMEDIAL PURPOSES OF THE WRIT.

The Fifth Circuit's ruling that habeas corpus is unavailable to test Garlotte's marijuana conviction—a conviction that continues directly to impose restraints on his freedom —is inconsistent not only with *Peyton* and its logic, but also with this Court's broader tradition in interpreting the jurisdictional scope of the writ. Time and again, where a plausible basis for finding the habeas petitioner to be "in custody" is apparent, the Court has construed the statutory grant of habeas jurisdiction broadly in accordance with its remedial purposes, and has shied away from constructions of 28 U.S.C. § 2241(c)(3) that would have denied a federal remedy to those with constitutional claims.

That the writ of habeas corpus is remedial in nature cannot be denied. *Schlup v. Delo*, 115 S. Ct. 851, 863 (1995) ("habeas corpus is, at its core, an equitable remedy"); *see Peyton*, 391 U.S. at 63-65. Designed to "provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person," *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968), the writ's operation "is to a large extent uninhibited by traditional rules of finality and federalism." *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973). The remedial character of the writ has animated the Court's interpretation of 28 U.S.C. § 2241(c)(3). Thus, although frequently invited to narrow the writ's jurisdictional scope, this Court has "consistently rejected interpretations . . . that would suffocate the writ in stifling for-

malisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Id.* at 350. Instead, this Court has repeatedly held that the "in custody" requirement of § 2241(c)(3) must be interpreted broadly.[20]

Consistent with this prescription, the Court has defined the term "custody" in § 2241(c)(3) to include state-imposed restraints short of confinement in prison. *See Jones*, 371 U.S. at 239-40. For example, a prisoner placed on parole remains "in custody" for habeas purposes. *Id.* at 242-43. And a criminal offender who remains free on bail or recognizance pending implementation of his sentence qualifies as "in custody" under § 2241(c)(3). *See Hensley*, 411 U.S. at 351. In a similar vein, this Court has long since held that a prisoner serving a sentence in one jurisdiction can be considered "in custody" under a detainer lodged by another jurisdiction. *See Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 488-89 (1973) (petitioner may challenge Kentucky detainer while serving in Alabama); *Estelle v. Dorrough*, 420 U.S. 534 (1975) (petitioner may challenge Texas detainer while serving federal prison term); *see also Nelson v. George*, 399 U.S. 224, 229 (1970) (petitioner may challenge adverse effects of North Carolina detainer on service of California sentence).

In addition to taking a broad view of the types of restraint that constitute "custody" under § 2241(c)(3), the Court has resisted constructions of the habeas statute

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[20] *See, e.g., Maleng*, 490 U.S. at 492 ("[W]e have very liberally construed the 'in custody' requirement for purposes of federal habeas"); *Hensley*, 411 U.S. at 350 n.8 (early cases proposing narrow reading of custody requirement described as "no longer . . . controlling"); *Carafas*, 391 U.S. at 239 (custody requirement must be read expansively in light of habeas statute's broad grant of authority to courts to dispose of habeas petitions "as law and justice require"); *Peyton*, 391 U.S. at 65 (broad reading of custody requirement "is consistent with the canon of construction that remedial statutes should be liberally construed").

that would have the effect of extinguishing jurisdiction that has properly attached. *See Carafas*, 391 U.S. at 239-40 (as long as prisoner is "in custody" as of time of habeas petition's filing, his subsequent release from prison does not defeat habeas jurisdiction). The *Carafas* decision is particularly instructive concerning the scope of the term "custody." There, the State of New York urged the Court that habeas jurisdiction could not be sustained under § 2241(c)(3) unless the petitioner remained "in custody" throughout the duration of the collateral proceeding, a position that rested on a plausible construction of the statute. *See, e.g., Parker v. Ellis*, 362 U.S. 574 (1960) (overruled by *Carafas*). The Court declined the invitation, observing that such a narrow construction of § 2241(c)(3) was inconsistent with the "province" of the writ—"to guarantee the most fundamental of all rights." The Court explained:

> [Carafas'] path has been long—partly because of the inevitable delays in our court processes and partly because of the requirement that he exhaust state remedies. He should not be thwarted now and required to bear the consequences of assertedly unlawful conviction simply because the path has been so long that he has served his sentence. *The federal habeas corpus statute does not require this result*, and *Parker v. Ellis* must be overruled.

391 U.S. at 240 (emphasis added) (footnotes omitted). The Court thus rejected its earlier conception of the "in custody" requirement because another plausible definition of the term was available that would more effectively advance the remedial purposes of the writ.

When the rule of construction pronounced in *Carafas* is properly applied to Garlotte's habeas petition, jurisdiction must be sustained under § 2241(c)(3). As described above, Garlotte's marijuana conviction—a conviction he contends is unconstitutional—continues both to postpone the commencement date of his subsequent sentences, and

to stand in the way of his earlier eligibility for release on parole. Because vacatur of his marijuana conviction would directly hasten his eligibility for release, Garlotte's petition falls squarely within the province of the writ.[21] As in *Carafas*, the text of § 2241(c)(3) does not compel adoption of a more stringent definition of the "in custody" requirement that would deny the writ to petitioners in Garlotte's circumstances. Under the rule of construction consistently employed by this Court, the Fifth Circuit's cramped view of § 2241(c)(3)'s jurisdictional grant must be rejected.

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[21] Although Carafas filed his petition while he was still in custody, the slow progress of his case through the lower state and federal courts resulted in his being released before his case could be heard. Similarly, Garlotte was disadvantaged by the fact that his marijuana sentence was shorter than the period required for compulsory prosecution of state post-conviction remedies. Thus, like Carafas, Garlotte "is suffering, and will continue to suffer, serious disabilities *because of the law's complexities and not because of his fault*, if his claim that he has been illegally convicted is meritorious. There is no need in the statute, the Constitution, or sound jurisprudence for denying to petitioner his ultimate day in court." *Carafas*, 391 U.S. at 239 (emphasis added). Applying *Carafas*, at least two courts have held that because 28 U.S.C. § 2254 requires the exhaustion of state remedies, a petitioner, like Garlotte, who begins the exhaustion process while still confined thereafter remains "in custody" for purposes of federal habeas jurisdiction. *Harrison v. Indiana*, 597 F.2d at 116-17 ("'He should not be thwarted now and required to bear the consequences of assertedly unlawful conviction simply because the path has been so long that he has served his sentence.'" (quoting *Carafas*, 391 U.S. at 240)); *United States ex. rel. Di Rienzo v. State*, 423 F.2d 224, 226 n.5 (3d Cir. 1970) (petitioner should not be barred from federal court because of time required to exhaust state remedies); *cf. Sibron v. New York*, 392 U.S. 40, 52-53 (1968) (Constitution does not contemplate that those deprived of constitutional rights should be left remediless simply because they have been awarded short sentences).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the decision below and remand this case for further proceedings.

Respectfully submitted,

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March 1, 1995

APPENDIX

APPENDIX A

TEXT OF STATUTORY PROVISIONS

28 U.S.C. § 2241(c)(3)

§ 2241. Power to grant writ

* * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States;

* * *

28 U.S.C. § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

* * *

Miss. Code Ann. § 47-5-138

§ 47-5-138. Earned time allowances; promulgations of rules and regulations; forfeiture generally; release of offender.

(1) The department may promulgate rules and regulations to carry out an earned time allowance program based on the good conduct and performance of an inmate. An inmate is eligible to receive an earned time allowance of one-half (½) of the period of confinement imposed by the court except those inmates excluded by law. When an inmate is committed to the custody of the department, the department shall determine a conditional earned time release date by subtracting the earned time allowance from an inmate's term of sentence and shall prepare a conditional earned time release date for each inmate.

(2) An inmate may forfeit all or part of his earned time allowance for a serious violation of rules. No forfeiture of the earned time allowance shall be effective except upon approval of the commissioner or his designee, and forfeited earned time may not be restored.

(3) An inmate who meets the good conduct and performance requirements of the earned time allowance program may be released on his conditional earned time release date.

Miss. Code Ann. § 47-5-139

§ 47-5-139. Certain inmates ineligible for earned time allowance; commutation to be based on total term of sentences; forfeiture of earned time in event of escape.

(1) An inmate shall not be eligible for the earned time allowance if:

(a) The inmate was sentenced to life imprisonment;

(b) The inmate was convicted as a habitual offender under Sections 99-19-81 through 99-19-87;

(c) The inmate has forfeited his earned time allowance by order of the commissioner;

(d) The inmate was convicted of a sex crime and has been denied parole based on the psychiatric or psychological examination required by law; or

(e) The inmate has not served the mandatory time required for parole eligibility for a conviction of robbery or attempted robbery with a deadly weapon.

(2) An offender under two (2) or more consecutive sentences shall be allowed commutation based upon the total term of the sentences.

(3) All earned time shall be forfeited by the inmate in the event of escape and/or aiding and abetting an escape. Provided, in the event of escape, the commissioner may restore all or part of the earned time if the escapee returns to the institution voluntarily, without expense to the state, and without act of violence while a fugitive from the facility.

(4) No inmate in any event shall have his sentence terminated by administrative earned time action until he is eligible for parole as provided in Title 47, Chapter 7, Mississippi Code of 1972.

(5) Any officer or employee who shall willfully violate the provisions of this section and be convicted therefor shall be removed from office or employment.

Miss. Code Ann. § 47-5-142

§ 47-5-142. Meritorious earned time.

(1) In order to provide incentive for offenders to achieve positive and worthwhile accomplishments for their personal benefit or the benefit of others, and in addition to any other administrative reductions of the length of an offender's sentence, any offender shall be eligible, subject to the provisions of this section, to receive meritorious earned time as distinguished from earned time for good conduct and performance.

(2) Subject to approval by the commissioner of the terms and conditions of the program or project, meritorious earned time may be awarded for the following: (a)

successful completion of educational or instructional programs; (b) satisfactory participation in work projects; and (c) satisfactory participation in any special incentive program.

(3) The programs and activities through which meritorious earned time may be received shall be published in writing and posted in conspicuous places at all facilities of the department and such publication shall be made available to all offenders in the custody of the department.

(4) The commissioner shall make a determination of the number of days of reduction of sentence which may be awarded an offender as meritorius earned time for participation in approved programs or projects; the number of days shall be determined by the commissioner on the basis of each particular program or project. However, in no event shall an offender be awarded in excess of ten (10) days reduction for each thirty (30) days of participation in such a program or project. Furthermore, an offender shall never be allowed to earn more than a total of one hundred eighty (180) days of meritorious earned time during the entire time he is under the jurisdiction of the Department of Corrections. The commissioner may authorize the awarding of all or any part of meritorious earned time upon an offender's entry into the correctional system.

(5) No offender shall be awarded any meritorious earned time while assigned to the maximum security facilities for disciplinary purposes.

(6) All meritorious earned time shall be forfeited by the offender in the event of escape and/or aiding and abetting an escape.

(7) Any officer or employee of the department who shall willfully violate the provisions of this section and be convicted therefor shall be removed from office or employment.

(8) An offender may forfeit all or any part of his meritorious earned time allowance for just cause upon the written order of the commissioner or his designee. Any meritorious earned time allowance forfeited under this section shall not be restored nor shall it be re-earned by the offender.

Miss. Code Ann. § 47-7-3.

§ 47-7-3. Parole of prisoners; conditions; determination of tentative hearing date.

(1) Every prisoner who has been or may hereafter be convicted of any offense against the State of Mississippi, and is confined in the execution of a judgment of such conviction in the Mississippi State Penitentiary for a definite term or terms of one (1) year or over, or for the term of his or her natural life, whose record of conduct shows that such prisoner has observed the rules of the Penitentiary, and who has served not less than one-fourth (¼) of the total of such term or terms for which such prisoner was sentenced, or, if sentenced to serve a term or terms of thirty (30) years or more, or, if sentenced for the term of the natural life of such prisoner, has served not less than ten (10) years of such life sentence, may be released on parole as hereinafter provided, except that:

* * *

(c) No one shall be eligible for parole until he shall have served one (1) year of his sentence, unless such person has accrued any meritorious earned time allowances, in which case he shall be eligible for parole if he has served (i) nine (9) months of his sentence or sentences, when his sentence or sentences is two (2) years or less; (ii) ten (10) months of his sentence or sentences when his sentence or sentences is more than two (2) years but no more than five (5) years; and (iii) one (1) year of his sentence or sentences when his sentence or sentences is more than five (5) years;

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